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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1012

JACQUELINE CORNELIUS, ET AL., *Petitioners*

v.

CITY OF PARMA, OHIO, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PRIOR OPINIONS

The Memorandum Opinion and Order of the district court (A. 1a-28a), dismissing the complaint, entered on February 22, 1974, is reported at 374 F. Supp. 730 (N.D. Ohio). The decision of the Court of Appeals for the Sixth Circuit (A. 29a), vacating the judgment of the district court and remanding the case for trial, was filed, without a published opinion, on October 22, 1974 and is reported at 506 F.2d 1400 (6th Cir.). The opinion of this Court (A. 30a) granting the petition for writ of certiorari, vacating the judgment of the Court of Appeals, and remanding the case "for further consideration in light of *Warth* v. *Seldin*, 422 U.S. 490," is reported at 422 U.S. 1052 (1975). The judgment on remand of the Court of Appeals (A. 31a), again filed without a published opinion, is reported at 521 F.2d

1401 (6th Cir. 1975). That Court's denial of the petition for rehearing (A. 32a) on October 31, 1975, is not yet officially reported.

JURISDICTION

On September 24, 1975, the Court of Appeals entered an order remanding the case to the district court "with instructions to dismiss the complaint" (A. 31a). That Court denied the plaintiffs' petition for rehearing on October 31, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

The question presented for review is whether lower income minority persons have standing, under Title VIII and other federal civil rights laws, to challenge racially discriminatory municipal conduct blocking construction of a subsidized housing project in which lower income minorities could live and preventing the construction of such projects in the future.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Section 1 of the Thirteenth Amendment provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2. Section 1 of the Fourteenth Amendment provides in relevant part:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

3. Section 1982 of Title 42 of the United States Code (Section 1978 of the Revised Statutes) provides as follows:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

4. Section 1983 of Title 42 of the United States Code (Section 1979 of the Revised Statutes) provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5. The relevant sections of Title VIII of the Civil Rights Act of 1968 (the Federal Fair Housing Act), 42 U.S.C. 3601-3619, are set forth in the Appendix (A. 32a-33a).

STATEMENT OF THE CASE

The plaintiff-petitioners are four lower income black residents of Cleveland's inner city, two white residents of Parma (a Cleveland suburb), and the Cleveland Branch of the National Association for the Advancement of Colored People (NAACP). The black plaintiffs seek to reside in Parma, a nearly all-white suburb immediately adjoining the City of Cleveland, Ohio.

For themselves and on behalf of all other persons similarly situated,[1] these plaintiffs seek equal access to suburban housing, suburban jobs, and suburban schools in Parma, but have been prevented from doing so because Parma purposefully excludes them on account of their race. The white plaintiffs, who reside in Parma, seek the benefits of inter-racial association and integrated living, which are denied by Parma's racially discriminatory conduct. Plaintiffs contend that this conduct denies to them rights secured by Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601-3619, and other federal civil rights laws.

To secure these federal rights, the plaintiffs filed the original complaint on April 27, 1973, and an amended pleading on May 24, 1973. They allege that the City of Parma and its officials, in an effort to maintain exclusion of minority residents, engaged in purposeful racial discrimination: (1) by denying a building permit for a subsidized housing project in which the minority plaintiffs could live; and (2) by adopting ordinances, in the form of a referendum requirement for subsidized housing and an absolute prohibition against residential dwellings higher than 35 feet, that prevent future efforts to construct such subsidized housing. These federal claims of racial discrimination were predicated upon the Federal Fair Housing Act (42 U.S.C. 3601-3619), as well as the older civil rights statutes (42 U.S.C. 1982 and 1983), and the Thirteenth

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[1] Early in the litigation, the District Judge certified the class to include: "All black citizens residing in the Greater Cleveland Metropolitan Area who are applicants or potential applicants for subsidized low and moderate income housing in the City of Parma, under the various programs enacted by the United States Congress or by the State of Ohio, who are being deprived by the actions or co-actions of the defendants of the right to reside therein." (A. 6a-7a n.2).

and Fourteenth Amendments to the United States Constitution.

The black plaintiffs are residents of Cleveland's inner city. Jacqueline Cornelius and Anita Hunter are tenants in an all-black housing project (Joint Appendix in Court of Appeals 7 [hereinafter "App."]). Mrs. Cornelius has children attending segregated schools. Both women have been unsuccessful in obtaining employment in Cleveland. Both would like to live and work in the Parma area, but lack of housing opportunities makes it impossible (*Id.*).

The third black plaintiff, Jimmy Carter, has been employed by a firm in Parma for eight years (*Id.*). Because he lives in Cleveland, Mr. Carter is required to drive substantial distances to and from his job. He would like to live in Parma with his family, but requires subsidized or low cost housing, which is not available in that City. Plaintiff Curtis Gay is an unemployed black Vietnam veteran who requires subsidized housing for the health, welfare, and safety of himself and his family (*Id.*). Before his military service, he had been employed in the Parma area, but is now unable to seek employment there because of the lack of housing opportunities in Parma.

In 1970, approximately 100,216 persons resided in Parma, the largest suburb of Cleveland (App. 10). At that time, 97 percent of the black population of Cuyahoga County, in which both Cleveland and Parma are located, was concentrated in Cleveland and three contiguous municipalities (*Id.*). As of 1970, only .015 percent of the black population of the county, or 50 persons, resided in Parma. This represented a decrease of 80 from the 130 black persons who lived in Parma in 1960 (*Id.*).

Employment opportunities for low and moderate income people have increased in Parma, while they have decreased in the City of Cleveland (*Id.*). In the past six years, more than 5,000 jobs have moved from Cleveland's inner city to the nearby suburbs (*Id.*). No major employers from the suburbs of Cuyahoga County have moved into the City of Cleveland. In 1971, the unemployment rate for non-whites in Cleveland was 18.2 percent, while the unemployment rate for the Standard Metropolitan Statistical Area, excluding Cleveland, was approximately 3.2 percent. The schools in the central city of Cleveland are segregated by race (*Id.*).

At the time the complaint was filed, the City of Parma did not have any public housing nor any other form of state or federally subsidized housing (*Id.*). Because of the substantial need for such dwellings, Forest City Enterprises, a private developer, submitted plans in the summer of 1971 to the Federal Housing Administration (FHA), an agency within the United States Department of Housing and Urban Development, for the construction of a high rise development for low and moderate income families (App. 11). This project, to be assisted under Section 236 of the National Housing Act, 12 U.S.C. 1715z-1, was to be built on land that was zoned for multi-family dwellings within the City of Parma (*Id.*). The FHA preliminarily approved the construction plans. Because of relatively high land costs in Northeastern Ohio, it is not feasible to develop Section 236 buildings in any form but high rise (*Id.*). As part of the approval, FHA required the developer to adopt and implement an affirmative marketing program which would insure equal housing opportunities (*Id.*).

Thereafter, the developer applied to the City of Parma for a building permit (*Id.*). When it became know that federally subsidized housing would be constructed in Parma, opposition to the project was raised by both city officials and private citizens at meetings of the Parma City Planning Commission (*Id.*). The opposition arose in part because the project would bring black Cleveland residents into Parma (*Id.*).

During the same time span, the summer and fall of 1971, residents of Parma placed on the November ballot two initiative measures: one to forbid the construction of subsidized housing until a referendum vote approving the project had first been held; and the other to prohibit any residential dwelling in excess of 35 feet (App. 11-12). On November 2, 1971, these proposals were approved by the Parma voters and were, as a consequence, incorporated into the Municipal Code as Chapters 1185 and 1528, respectively (App. 12). On November 3, the day immediately following approval of the two measures, the City of Parma denied to the private developer the building permit for the construction of subsidized housing (*Id.*).

The amended complaint further alleges that the conduct of the City of Parma, among other things: (1) excludes low income black and other minorities from living in Parma; (2) maintains and perpetuates the all-white character and image of the City of Parma; (3) deprives white residents of Parma of the benefits of an integrated community, including the opportunity to associate with members of minority groups; (4) deprives low and moderate income white residents of Parma of the opportunity to live in subsidized housing in their community because of the potential non-white

occupancy of such housing; (5) discourages prospective builders and sponsors of low income housing from building in Parma; and (6) interferes with and frustrates federally assisted housing programs (*Id.*). The result of Parma's denial of equal housing opportunities is also to exclude black and other minorities from equal access to jobs in the Parma area and to deprive their children of equal educational opportunities (App. 13).

In addition to the factual allegations in the complaint, the plaintiffs also submitted five affidavits (App. 34-48) to the district court in response to its order of November 9, 1973. These affidavits supplement and elaborate upon the allegations. The affiants include builders and housing sponsors who have constructed or stand ready to construct housing for lower income, minority persons. They recognize the need for such housing in Parma and desire to meet that need.

The affidavits, which were never rebutted by the defendants, disclose several important facts bearing on this appeal. First, opposition to the construction of subsidized housing in Parma has been racially motivated (App. 41). Second, they demonstrate that, at the time Parma denied a building permit for a federally assisted housing project, it granted a permit for a nearly identical unsubsidized high rise complex (App. 34). Third, they show a continuing need for low income housing in Cleveland's suburbs, including Parma, which these minority plaintiffs can afford (App. 38). Fourth, the affidavits demonstrate that municipal action, such as that taken by Parma, effectively precludes developers from even attempting to construct subsi-

dized housing. The referendum ordinance particularly prevents contractors from building subsidized housing for low income minorities. One builder stated that "it would be an exercise in futility to realistically expect to build in such a community" (App. 41). Fifth, they show that builders are ready, willing, and able to construct subsidized housing in Parma if "local conditions permit" (App. 38). The developers, however, are unwilling to litigate refusals by municipalities to permit such construction for, among other reasons, fear of alienating local officials and citizens with whom they have to deal (App. 48).

In short, the defendants' conduct consists of blocking construction of a particular subsidized housing project in which lower income minorities could reside and adopting ordinances which effectively prevent future efforts to construct such projects. Plaintiffs allege, and are prepared to prove, that the purpose and effect of Parma's conduct is racially discriminatory—specifically, to exclude racial minorities from residence in Parma and to maintain Parma's all-white character and image.

On February 22, 1974, the district court dismissed the amended complaint of the private plaintiffs for lack of justiciability (A. 7a-26a).[2] The district court permitted the United States to continue its nearly identical action against Parma. On October 22, 1974, the Court of Appeals vacated the order of dismissal

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[2] The district court ruled that the challenge to the referendum requirement was not ripe for adjudication, that the 35-foot height restriction was "on its face entirely neutral" (A. 12a), that the challenge to the building permit denial was moot, and that the black plaintiffs lacked standing to challenge Parma's alleged racially discriminatory conduct.

and remanded the case for trial (A. 29a).[3] On June 30, 1975, this Court vacated the judgment of the Court of Appeals and remanded the case for further consideration in light of *Warth* v. *Seldin*, 422 U.S. 490 (A. 30a).

On September 24, 1975, the Court of Appeals, without affording opportunity for further briefs or oral argument, remanded the case to the district court "with instructions to dismiss the complaint" (A. 31a). The Court of Appeals viewed *Warth* v. *Seldin* as "completely dispositive of the instant litigation" (A. 31a). The plaintiffs' petition for rehearing was denied on October 31, 1975 (A. 32a).

REASONS FOR GRANTING THE WRIT

The standing of lower income minorities to challenge purposeful conduct of a suburban municipality which excludes them because of their race is the only issue presented for review by this Petition. The black plaintiffs, joined by the NAACP and white residents of Parma, allege that the virtually all-white City of Parma, in a deliberate effort to maintain exclusion of racial minorities, blocked construction of a subsidized housing project in which they could live. They further contend that the City, in the wake of the dispute over the federally assisted project, also adopted two ordinances which prevent the construction of such housing in the future. The complaint alleges that both actions are racially discriminatory, effectively excluding plaintiffs and other lower income minorities from residing

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[3] The Second Circuit's decision in *Warth* v. *Seldin*, 495 F.2d 1187 (2d Cir. 1974) was briefed and argued by plaintiffs, defendants, and the United States as *Amicus Curiae*, before the Court of Appeals.

in the City of Parma. The black and white plaintiffs, together with the NAACP, assert they have standing to challenge the denial of the building permit and the exclusionary ordinances. In view of the clear injury to their right to equal housing opportunity, plaintiffs seek a hearing on the merits of their claim of housing discrimination.

The plaintiffs' claims of racial discrimination rest on three federal statutes[4] and the Thirteenth and Fourteenth Amendments to the United States Constitution. Plaintiffs rely primarily on Title VIII of the Civil Rights Act of 1968, the Federal Fair Housing Act.[5] 42 U.S.C. 3601-3619.

THE DECISION REPRESENTS A MISREADING OF THIS COURT'S DECISION IN *WARTH* v. *SELDIN*, AND IS IN CONFLICT WITH THIS COURT'S PRIOR RULING, IN *TRAFFICANTE* v. *METROPOLITAN LIFE INSURANCE CO.*, ON STANDING TO CHALLENGE RACIAL DISCRIMINATION IN HOUSING UNDER TITLE VIII.

In *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), this Court examined the issue of standing under Title VIII. In that case, tenants residing in a virtually all-white apartment complex sought to sue the management to enjoin alleged racially discriminatory practices. The plaintiffs were not the direct victims of racial discrimination. Further, as the Court of Appeals decision in *Trafficante* made clear,

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[4] 42 U.S.C. 1982, 1983, and 3601-3619.

[5] The plaintiff's claims of racial discrimination also rest on 42 U.S.C. 1982, the post Civil War "fair housing" statute, *see Jones* v. *Mayer Co.*, 392 U.S. 409 (1968), and 42 U.S.C. 1983, which incorporate rights secured under the Thirteenth and Fourteenth Amendments.

they were not challenging a specific act of racial discrimination. *Trafficante* v. *Metropolitan Life Insurance Co.*, 446 F.2d 1158, 1162 (9th Cir. 1971). Nonetheless, this Court held that the plaintiffs had standing under Title VIII.

The Court reasoned, quoting from the brief of the Solicitor General, that Title VIII represented "a policy that Congress considered to be of the highest priority." *Trafficante, supra* 409 U.S. at 211; that Congress intended to define standing very expansively under Title VIII; and that the "minimal" role of the Attorney General in relation to "the enormity of the task of assuring fair housing" means that the main generating force must be private suits by complainants acting as "private attorneys general." 409 U.S. at 211. The Court concluded that Title VIII must be given a "generous construction," 409 U.S. at 212, and accordingly granted standing to the plaintiffs in that case.

In this petition, the plaintiffs, particularly the lower income minority plaintiffs, present an even stronger case for standing than the one presented in *Trafficante*. Here, lower income minorities are the direct objects of Parma's racially discriminatory conduct. The conduct which plaintiffs challenge consists of specific acts of racial discrimination—blocking construction of a particular subsidized housing project in which they could live and adoption of ordinances effectively preventing future efforts to construct such housing. These acts are aimed at excluding them, because of their race, from residing in the City of Parma.

Thus, in this case, plaintiffs are the direct objects of specific acts of racial discrimination. The right which

plaintiffs are seeking to secure through this lawsuit is their own right as "private attorneys general" to protection against racially discriminatory conduct. Nonetheless, after remand by this Court to the Court of Appeals below, "for further consideration in light of *Warth* v. *Seldin*," the lower court, without affording opportunity for briefs or oral argument, and without an opinion providing an explanation for its decision, dismissed the complaint of these "private attorneys general," stating that *Warth* v. *Seldin* was completely dispositive of the instant litigation.[6]

Plaintiffs contend that the decision by the Court of Appeals in the instant case undermines the integrity of this Court's decision in *Trafficante* and mistakenly creates a conflict between *Trafficante* and *Warth*, which this Court did not intend and which, in fact, does not exist. The Court of Appeals decision in this case, at best, creates uncertainty and confusion regarding standing under Title VIII. The Court of Appeals decision also reflects the erroneous view that this Court, in *Warth, sub silentio* overruled, or at least severely restricted, its earlier ruling in *Trafficante*. This view, plaintiffs urge, is without foundation. *Trafficante* and *Warth* are entirely consistent with each other. And, as

[6] The district court, in dismissing the complaint in the instant case, at the same time upheld the justiciability of the consolidated case brought by the Department of Justice involving virtually identical allegations against the City of Parma and its officials. Thus, the Court of Appeals decision results in the incongruous situation in which the Department of Justice is permitted to maintain the action challenging Parma's alleged racially discriminatory exclusion of lower income minorities, while the lower income minorities, whose rights the Department of Justice is seeking to secure, are not permitted to pursue the action themselves.

the facts of this case demonstrate, it is *Trafficante,* not *Warth,* that is dispositive.

First, as Mr. Justice Powell emphasized in *Warth,* "the critical distinction between Trafficante and the situation [in *Warth*]" lies in the failure of the *Warth* plaintiffs to assert any right of action under Title VIII of the 1968 Civil Rights Act. *Warth, supra* 422 U.S. at 513. "Nor," added Mr. Justice Powell, "can the complaint fairly be read to make out any such claim." 422 U.S. at 513.

In the present suit, as in *Trafficante,* Title VIII is the principal source of plaintiffs' claim for relief and racial discrimination is the only issue raised by the complaint.[7] In the *Warth* case, the plaintiffs principally claimed that the defendants discriminated against them on account of their economic status. In *Warth,* each of the individual plaintiffs attempted to assert standing, as Justice Powell pointed out, "as a person of low or moderate income and, coincidentally, as a member of a minority racial or ethnic group." 422 U.S. at 502.

In sharp contrast, the plaintiffs' claims here involve racial, not economic, discrimination. Consequently, we invoke the broad standing principles applicable to actions instituted under Title VIII. *Trafficante* v. *Metropolitan Life Insurance Co., supra.* In *Warth,* where this Court expressly noted the absence of any Title

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[7] Because of the Title VIII claim of racial discrimination, the two white plaintiffs, who are residents of Parma, have standing under *Trafficante* to challenge discriminatory municipal conduct, as this Court suggested in *Warth, supra* 422 U.S. at 513, n.21. Thus, it is incongruous to deny standing to the black plaintiffs, the direct victims of Parma's racially exclusionary practices.

VIII claim,[8] the plaintiffs there could not rely upon the expansive standing principles applicable to claims brought under that statute. Because they charged only economic discrimination, the *Warth* plaintiffs were left without the benefit of Title VIII and the other federal statutes enacted to insure racial equality.

The second major difference between *Warth* and this case is the presence here of "specific, concrete facts demonstrating that the challeged practices harm [these plaintiffs]". *Warth* v. *Seldin, supra* 422 U.S. at 508. The *Warth* plaintiffs launched a broad-scale attack upon a general zoning ordinance, seeking to enjoin the entire law. Such claims, as this Court has noted, are little more than "generalized grievances about the conduct of government," *Flast* v. *Cohen*, 392 U.S. 83, 106 (1968), which are clearly inadequate for standing purposes. In addition, the *Warth* plain-

[8] In the instant case, the defendants erroneously asserted in the initial appeal in the Court of Appeals in 1974 that Title VIII was no longer in the case because the district court, on September 18, 1973, initially ruled such claims were time barred. First, the district judge never finalized that preliminary ruling as is required by Rule 54(b), Fed.R.Civ.P., in cases involving multiple claims or multiple parties. Thus, the court's September 18 order did not "terminate the action as to any of the claims . . . ." Rule 54(b). Moreover, the October 22, 1974 order of the Court of Appeals vacated the district court's judgment, rendering its rulings respecting Title VIII null and void. Second, in the district court's Memorandum Opinion and Order of February 22, 1974, dismissing the complaint, the judge applied the Title VIII limitations period only as to the claim of the white residents of Parma respecting the denial of the construction permit. Third, the interference claim under Title VIII, 42 U.S.C. 3617, does not carry the abbreviated limitations period of 42 U.S.C. 3612. *See Smith* v. *Stechel*, 510 F.2d 1162 (9th Cir. 1975). Thus, Title VIII is still in the case. In any event, plaintiffs' claims of racial discrimination are also based on 42 U.S.C. 1982 and 1983, which do not carry the restrictive limitations period of 42 U.S.C. 3612.

tiffs failed to allege that they were eligible for or would have benefited by any of the subsidized housing projects proposed to be built in the defendant municipality. This Court noted that "the record is devoid of any indication that these projects, or other like projects, would have satisfied Petitioners' needs at prices they could afford. . . ." *Warth* v. *Seldin, supra* 422 U.S. at 506.

Again, in contrast, the plaintiffs in this case allege explicitly that they and members of the class they represent were eligible to reside in the subsidized housing project which was blocked by the defendants. Indeed, for nearly one year after this lawsuit began, the developer stood ready, willing, and able to build those housing units as soon as Parma granted the construction permit. The plaintiffs here also allege that two specific ordinances, not the entire zoning law, now effectively prevent the construction of other dwellings they could afford. Further, in *Warth*, the zoning law plaintiffs sought to challenge had been adopted fully ten years before the complaint was filed, not as a response to a particular housing project. Here, by contrast, the two ordinances were adopted as a direct result of the Forest City proposal to construct a subsidized housing project in which the lower income black plaintiffs could live. Thus, in this case, unlike *Warth*, "the initial focus [is] on a particular project." *Warth* v. *Seldin, supra* at 508, n.18.

These facts establish "the necessary allegations of demonstrable, particularized injury" which this Court found lacking in *Warth*. 422 U.S. at 508. They also demonstrate the "causal relationship" between plaintiffs' alleged injury and the defendants' conduct, which the record in *Warth* did not disclose. 422 U.S. at 507.

The relief sought in *Warth* is a third distinguishing factor. Those plaintiffs sought a declaratory judgment that the entire zoning ordinance was unconstitutional, an injunction against enforcing it, and a remedial order requiring the enactment of a new law. This Court concluded that the plaintiffs' living conditions would not "improve were the Court to afford relief." 422 U.S. at 507. To have standing, this Court noted, plaintiffs must show that they "personally would benefit in a tangible way from the court's intervention." 422 U.S. at 508.

The plaintiffs here would "benefit in a tangible way" if they prove their allegations of racial discrimination. If "local conditions permit," Forest City Enterprises, the developer whose project Parma blocked, is still prepared to build subsidized housing in Parma for these plaintiffs and the class they represent (App. 38). The plaintiffs here seek a remedial order to guarantee that "local conditions" produce, not merely "permit," the construction of housing these lower income minorities can afford. If the plaintiffs prove their allegations of racial discrimination, Parma and its officials will be required to develop and implement an affirmative plan to correct the effects of their past discriminatory practices. *See, e.g., Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Green* v. *County School Board*, 391 U.S. 430 (1968); *Louisiana* v. *United States*, 380 U.S. 145 (1965). That will surely provide the opportunity for these minority plaintiffs to reside in Parma. Thus, they will "benefit in a tangible way" by the court's intervention.

Petitioners stress that the standing issue presented by this Petition has practical importance that extends beyond the technical principles of justiciability. At

stake is whether racial minorities will be able to protect their right to be free of racially discriminatory exclusion by white suburbs in the federal courts, the forum to which they historically have looked for protection against governmental discrimination. At stake too is whether the broad promise of fair housing, which Congress enacted into Title VIII, will be achieved in fact as well as in legal theory. And finally at stake is whether racial polarization in metropolitan areas will be permitted to intensify through the continued denial of minority access to suburbia because federal courts are not available to litigate such claims under Title VIII.

The existence of racial polarization between inner city minorities and suburban whites, and its adverse impact on the nation's social and economic well-being, have been recognized and documented. *See, e.g.,* U.S. Commission on Civil Rights, *Equal Opportunity in Suburbia,* 4-15 (1974). The role that suburban exclusionary practices have played in creating and perpetuating this racial polarization has also been recognized and documented. *See, e.g.,* U.S. Commission on Civil Rights, *Understanding Fair Housing,* 17-18 (1973). These exclusionary practices have been held unlawful under federal civil rights laws, including Title VIII. *See, e.g., United States* v. *City of Black Jack,* 508 F.2d 1179 (8th Cir. 1974), *cert. denied* 422 U.S. 1042 (1975); *Crow* v. *Brown,* 332 F. Supp. 382 (N.D. Ga. 1971), *aff'd per curiam,* 457 F.2d 788 (5th Cir. 1972); *Dailey* v. *City of Lawton,* 425 F.2d 1037 (10th Cir. 1970). The essence of the unlawful conduct is racial discrimination, and the persons most vitally injured are the inner city minorities denied access to housing in the suburbs. As one court pointed out in an analo-

gous case, involving municipal efforts to block construction of subsidized housing for minorities: "[T]hese people [lower income minority homeseekers] are the true parties in interest here." *Cuyahoga Metropolitan Housing Authority* v. *City of Cleveland*, 342 F. Supp. 250, 256 (N.D. Ohio 1972) *aff'd sub nom CMHA* v. *Harmody*, 474 F.2d 1102 (6th Cir. 1973).

But if the inner city minority homeseekers, their organizational representatives, and white supporters in the suburbs are denied standing to challenge particular exclusionary conduct, the rights that Title VIII and other federal civil rights laws purport to confer become illusory. Suburban exclusion, no matter how blatantly discriminatory, is likely forever to go unchallenged.

First, as the record in the instant case shows, builders and developers whose efforts to construct minority housing are blocked by racially discriminatory municipal conduct are unwilling or unable to press their claim in court. Second, reliance on the Attorney General to protect the right to non-discriminatory access to the suburbs offers little promise of securing needed relief. This Court has characterized the overall role of the Attorney General in enforcing the provisions of Title VIII as "minimal." *Trafficante, supra*, 409 U.S. at 211. With his small fair housing staff, consisting of one section of one division of the Department of Justice, there are obviously severe limits on the Attorney General's effectiveness in attacking the specific problem of suburban exclusion of minorities. It is the excluded minorities, themselves, in their capacity as "private attorneys general," who must play the key role. Third, since lower income minorities have been prevented from residing in substantial numbers in

suburban communities like Parma, they do not possess the political strength to assert their claims through the "normal democratic process." *Warth* v. *Seldin, supra* 422 U.S. at 508, n.18. Thus, the very success of a subsurb's racially discriminatory exclusion of minorities assures that minorities will remain powerless to effect needed changes in local land use practices through exercise of the franchise. In short, if these plaintiffs are denied standing to challenge purposeful discriminatory exclusion by suburban municipalities, the effect necessarily will be to insulate such conduct from attack.

Congress has already enacted statutes to insure that exclusionary devices, such as those adopted by Parma, are not employed to keep out racial minorities. Chief among them is Title VIII of the Civil Rights Act of 1968, a law which, this Court stressed, must be given a "generous construction," if it is to have vitality. *Trafficante, supra* 409 U.S. at 212. If that important statute is to have real meaning to racial minorities, for decades the victims of discriminatory exclusion from the benefits of suburban living, they must at the least be afforded the opportunity to secure the rights guaranteed by Title VIII through the only available means, recourse to the courts.

Plaintiffs seek only the opportunity to prove, through a trial, their allegations of racial discrimination against the City of Parma and its officials. It is that opportunity which has been foreclosed by the Court of Appeals' decision dismissing the complaint. And it is that opportunity which plaintiffs seek through this Petition.

CONCLUSION

The Court of Appeals decided this case contrary to this Court's decision in *Trafficante* and misapplied its decision in *Warth*. To rectify these errors and to decide an important question of standing under the Federal Fair Housing Act, this Court should grant the Petition for a Writ of Certiorari and bring the case here for review.

Respectfully submitted,

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January 16, 1976

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 73-437

JACQUELINE CORNELIUS, ET AL., *Plaintiff*

v.

CITY OF PARMA, ET AL., *Defendant*

No. C 73-439

UNITED STATES OF AMERICA, *Plaintiff*

v.

CITY OF PARMA, OHIO, *Defendant*

MEMORANDUM OPINION AND ORDER

(FILED FEBRUARY 22, 1974)

Battisti, C.J.

I. INTRODUCTION

These are consolidated cases challenging housing practices pursued by the City of Parma, Ohio.

C 73-439 (hereinafter referred to as the Government's suit) was instituted by the Attorney General, on behalf of the United States, pursuant to Section 813 of the Fair Housing Act of 1968, 42 USC § 3613 and 28 USC § 1345. The Government alleges that it has been the policy of Parma to exclude black persons from residing within its limits in any significant numbers, and that the City in accordance with this policy has engaged in acts and practices which effectively operate to deny equal housing opportunity to blacks on account of race. More specifically, the Government charges that Parma in the fall of 1971 refused to issue a building permit to allow the construc-

tion of a federally assisted apartment development by Forest City Enterprises, an Ohio corporation, for the reason that the development would have provided opportunity for a substantial degree of desegregated occupancy within the boundaries of the City. Additionally, the Government challenges ordinances enacted by initiative vote of the Parma electorate at about the same time as the apartment development was blocked by Parma officials.

One of these ordinances generally limits the height of residential buildings to be constructed in Parma to thirty-five feet. The other provides that "no low-rent housing project shall be developed, constructed or acquired in any manner in the City by any public body or authority, nor shall approval be granted for participation in the Federal Rent Supplement Program, until a majority of the qualified electors of the City voting upon such issue approve such project or such participation by voting in favor thereof at an election to be held for that purpose or at the next primary or general election."[1]

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[1] The two Ordinances have been incorporated in Parma's municipal building code. The height limitations ordinance is contained in Section 1529.37 of the code. It provides:

> "MAXIMUM HEIGHT OF RESIDENTIAL STRUCTURES.
>
> No building designed for and occupied in whole or in part as a residence, including, but not limited to, single-family houses, dwelling houses, multiple dwellings, lodging houses, apartment houses, hotels and condominiums, shall exceed thirty-five feet in height. (Initiative. Passed 11-2-71.)"

The referendum requirement ordinance is contained in Chapter 1528 of the code. Its full text is as follows:

> "1528.01 DEFINITIONS.
>
> For the purpose of this chapter:
>
> (a) 'Low rent housing project' means:
>
> (1) Any development composed of one or more dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a State public body or authority or to which the Federal Government or a State public body or authority extends assistance by supplying all or part

It is contended that these ordinances, although facially neutral, were enacted for the purpose of preventing the

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of the labor, by guaranteeing the payment of liens, or otherwise, or

(2) Any development composed of one or more dwellings, apartments or other living accommodations for persons of low income, developed, constructed or acquired by a private individual or a nonpublic body, and to which the Federal Government will make rent supplement payments on behalf of low income families or individuals eligible for public housing.

(b) 'Persons of low income' and 'low income families' means persons or families who lack the amount of income which is necessary to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding, as determined by the public body or authority developing, constructing or acquiring the housing project or by the administrator of the Federal Rent Supplement Program pursuant to Federal or State laws, rules or regulations.

'Federal Rent Supplement Program' means any plan, program, law, rule or regulation of the Federal Government under which the Federal Government pays to private individuals or nonpublic bodies owing a low rent housing project, all or any part of the rent of low income families or individuals eligible for public housing. (Initiative. Passed 11-2-71.)

1528.02 Approval by Electors.

No low rent housing project shall be developed, constructed or acquired in any manner in the City by any public body or authority, nor shall approval be granted for participation in the Federal Rent Supplement Program, until a majority of the qualified electors of the City voting upon such issue approve such project or such participation by voting in favor thereof at an election to be held for that purpose or at the next primary or general election. Such election shall be provided for by resolution of Council. (Initiative. Passed 11-2-71.)

1528.03 Severability.

If any sentence, clause, section or part of this chapter is found to be unconstitutional, illegal or invalid, such unconstitutionality, illegality or invalidity shall affect only such clause, sentence, section or part of this chapter and shall not affect or impair any of the remaining provisions, sentences, clauses sections or other parts of this chapter. It is hereby declared to be the intention of the electors that this chapter would have been adopted had such unconstitutional, illegal or invalid sentence, clause, section or part thereof not been included herein. (Initiative. Passed 11-2-71.)

construction in Parma of racially integrated housing for persons of low and moderate income and, in the context of Parma's longstanding posture toward such housing, have had such an effect.

Parma's conduct, it is alleged, constitutes a pattern and practice of resistance to the full enjoyment of rights secured by Title VIII of the Fair Housing Act of 1968, 42 USC § 3601 *et seq.*, and by the Thirteenth and Fourteenth Amendments to the United States Constitution, as well as a denial of rights to equal opportunity in housing, raising an issue of general public importance. This conduct has allegedly worked to:

(a) perpetuate the present all-white character of the City;

(b) deny dwellings to prospective black residents of excluded housing on account of race;

(c) deny dwellings to prospective white residents of such housing on account of the race of their black prospective fellow-residents; and

(d) interfere with the right of actual and prospective sponsors of federally assisted housing to assist persons in exercising their right to equal housing opportunity.

The Government seeks an order generally enjoining Parma and all it agents and officers from continuing to pursue its discriminatory housing practices and affirmative relief aimed at having the City undertake measures to correct the effects of its past unlawful conduct.

By memorandum opinion and order dated September 5, 1973, this Court denied Parma's motion to dismiss the Government's suit. It was ruled *inter alia* that a municipality is a "person" subject to suit under Section 3613 of the Fair Housing Act, and that the Government's complaint stated a claim for relief.

C 73-437 (hereinafter referred to as the Cornelius suit) was initially instituted by the Cleveland Chapter of the NAACP; the Housing Task Force; the Ozane Construction Company; five low and moderate income black plaintiffs presently residing in the Cleveland Metropolitan Area (but not Parma) who allege that they desire to reside in Parma but are prevented from doing so by the alleged racially discriminatory practices and policy of the City; and two white citizens of Parma charging that Parma's discriminatory policy deprives them of the social, economic, and professional benefits of an integrated community. The action seeks redress for alleged violations of rights secured by the Thirteenth and Fourteenth Amendments, the Civil Rights Act of 1966 (42 USC § 1982), the Civil Rights Act of 1871 (42 USC § 1983), and the Fair Housing Act of 1968 (42 USC § 3601). Jurisdiction is predicated on 28 USC § 1343(3) and (4), 28 USC § 2201, and 42 USC § 3612. The named defendants are the City of Parma, its Mayor, its President of the City Council and its Councilmen.

The complaint in *Cornelius* sets forth detailed allegations relative to the racial composition of defendant City and the circumstances surrounding Parma's blocking of the Forest City Section 236 project. It is alleged, for example, that while Parma is the largest suburb in Cuyahoga County, having a population of approximately 100,216 residents, only .015% of the black population of the County, or fifty persons, reside in the City.

A fair reading of the complaint indicates that its basic thrust is directed against Parma's adoption and implementation of the ordinances previously discussed in regard to the Government's suit. It is alleged that the City's conduct, in enacting and implementing these ordinances, was aimed at setting up barriers to exclude low and moderate income blacks and other minorities from living in the City. The ordinances are said to have the further effect

of maintaining the virtually all-white character and image of Parma, depriving white residents of Parma of the benefits of an integrated community, discouraging prospective builders and sponsors of low-income housing from building within the City of Parma, interfering generally with federally assisted housing programs, and excluding blacks and other minorities from equal access to jobs in the Parma area as well as equal access to educational opportunities. The plaintiffs in *Cornelius* seek as relief a declaration that the ordinances are void and of no effect, an injunction against Parma and its agents from engaging in further discriminatory housing practices and affirmative remedial action.

In a memorandum opinion and order dated September 18, 1973, the Court made the following rulings:

(1) The Cleveland Branch of the NAACP, the Ozane Construction Company, and the Housing Task Force lacked standing to sue.

(2) The action was untimely brought under 42 USC § 3612 of the Fair Housing Act, which expressly sets forth a 180 day limitations period.

(3) Insofar as plaintiffs' complaint sought relief under 42 USC § 1983 against the City of Parma, it was dismissed.

(4) The white individual plaintiffs lacked standing to sue under 42 SEC § 1982.

(5) The black individual plaintiffs could maintain their suit as a class action pursuant to 23(b)(2) F.R. Civ.P.[2]

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[2] The class the named black plaintiffs represent has been defined as follows:

"All black citizens residing in the Greater Cleveland Metropolitan Area who are applicants or potential applicants for subsidized low and moderate income housing in the City of

II. PRESENT MOTIONS

Plaintiffs in *Cornelius* have filed several motions praying the Court to reconsider portions of its order of September 18, 1973. Plaintiffs seek reconsideration of: (a) the dismissal of plaintiffs' claim under the Fair Housing Act of 1968 and (b) the ruling that the white plaintiffs lack standing to sue. In addition, motion has been made pursuant to Rule 15 F.R.Civ.P. by the Cleveland Chapter of the NAACP to amend the complaint so that it may set forth allegations which it is contended would suffice to give it standing to sue.

By order dated November 9, 1973 the Court raised on its own motion whether plaintiffs, or any of them, in the *Cornelius* suit satisfy the threshold requirement imposed by Article III of the Constitution of alleging an actual case or controversy, and whether any or all the issues sought to be litigated by the Government in its suit are justiciable. In support of their respective positions, the parties submitted briefs, affidavits, and other supporting papers. Hearing was held on all questions pending before the Court on December 10, 1973.

III. CORNELIUS SUIT

A. Justiciability

The judicial power of federal courts is defined to Article III of the Constitution and is restricted to "cases" and "controversies." Giving expression to this case and controversy limitation is the doctrine of "justiciability," which is in itself no more than a "term of art" utilized by the courts to enforce the jurisdictional requirements of Article III. "Justiciability is . . . a concept of uncertain

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Parma, under the various programs enacted by the United States Congress or by the State of Ohio, who are being deprived by the actions or co-actions of the defendants of the right to reside therein."

meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action." *Flast* v. *Cohen,* 392 US 83, 95 (1968).

In general, the doctrine of justiciability, in its various aspects, serves to assure that federal courts pass only on questions raised in actual controversies and which are appropriate for judicial determination.

Despite certain references in the *Cornelius* complaint to Parma's blocking of the section 236 project, it is unclear, as discussed more fully *infra,* whether these plaintiffs seek directly to challenge the building permit denial. Any such claim would in itself present substantial justiciability problems. See *infra.* But, there is no doubt that plaintiffs' major purpose in instituting this suit is to seek both declaratory and injunctive relief relative to the two ordinances at bar.

A request for declaratory relief may be considered independently of whether other forms of relief are appropriate. *Powell* v. *McCormick,* 395 US 486, 518 (1969). The Federal Declaratory Judgment Act, 28 USC § 2201, however, while providing an additional remedy to litigants, does not add to, or expand, the jurisdiction of federal courts. *Alabama State Federation of Labor* v. *McAdory,* 325 US 450, 461 (1944). An actual case or controversy is still required.[3] *Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339

[3] The language of 28 USC § 2201 is significant:

"In a case of *actual* controversy within its jurisdiction . . any court of the United States, upon the filing of an appro-

US 667, 671 (1950); *Aetna Life Ins. Co.* v. *Haworth,* 300 US 227, 240 (1937). Thus in *United Public Workers of America* v. *Mitchell,* 330 US 75, 89 (1947), it was stated: "For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite. This is as true of declaratory judgments as any other field." (Citations omitted.)

In determining whether a declaratory judgment should issue, courts must distinguish between the real case or controversy and the abstract, hypothetical dispute. This is often a difficult and delicate task. "Basically the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality. . . ." *Maryland Casualty Co.* v. *Pacific Coal and Oil Co.,* 312 US 270, 273 (1941). In the actual implementations of this test, the Supreme Court has continuously emphasized the substantial degree of concreteness required in declaratory judgment actions. *See e.g., Laird* v. *Tatum,* 408 US 1 (1972); *Poe* v. *Ullman,* 367 US 497 (1961); *Communist Party of United States* v. *Subversive Activities Control Board,* 367 US 1 (1960); *See generally McCahill* v. *Borough of Fox Chapel,* 438 F.2d 213, 215-217 (3d Cir. 1971).

With the above principles in mind, the Court will pass on each of the claims arguably contained in the *Cornelius* complaint in order to determine whether, with regard to any or all of the plaintiffs, such claims meet the tests of justiciability.

1. Black Plaintiffs

Plaintiffs' complaint as noted previously sets forth a number of factual allegations relative to Parma's denial

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priate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." (Emphasis added.)

of a building permit for construction by Forest City Enterprises of a section 236 project. The standing of future residents of proposed subsidized or public housing projects has been recognized in numerous cases where such persons have joined with developers or sponsors in concrete challenges to exclusionary actions of governmental authorities. *See e.g., Park View Heights Corp.* v. *City of Black Jack,* 467 F.2d 1208 (8th Cir. 1972); *Sisters of Prov. of St. Mary of Woods* v. *City of Evanston,* 335 F.Supp. 396 (N.D.Ill.1971); *Crow* v. *Brown,* 332 F.Supp. 382 (N.D. Ga. 1971), *aff'd.,* 457 F.2d 788 (5th Cir. 1971); *Dailey* v. *City of Lawton,* 296 F.Supp. 266 (W.D.Okla.1966), *aff'd.,* 425 F.2d 1037; *Kennedy Park Homes Assoc.* v. *City of Lackawanna,* 318 F.Supp. 609 (W.D. N.Y. 1970), *aff'd.,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 US 1010 (1971).

In each of the above-cited cases, however, the blocked developments were still viable; the builders and sponsors by bringing suit affirmatively indicated their continuing interest in pursuing their projects to completion. Standing was accordingly granted to future residents as it was clear that live and real controversies existed regarding the projects sought to be built, and future tenants of the blocked developments had clear personal stakes in the outcome of the suits.

Here it is undisputed that Forest City Enterprises has abandoned its proposed project and is not itself contesting Parma's conduct relative to the project.[4] Although it can

[4] In an affidavit dated November 19, 1973, by Mr. Nathan Shafron, Executive Vice-President of Forest City Enterprises, it was explained that even though Forest City Enterprises, at the time its building permit application was denied, had already expended Fifty Thousand Dollars in preparatory work, it deliberately decided not to pursue any rights it may have had to build the project. This decision was based on what it considered to be the intensity of citizen opposition to the project and the likelihood that expensive and time-consuming litigation would be necessary

be said that the future residents of this project may have been injured by Parma's activity, no live controversy presently exists regarding this housing. Indeed, plaintiffs accept this reality, for as shown by their complaint none of them have alleged that they were themselves prospective tenants of the Forest City development. Nor do they seek to represent a class so limited.[5]

In any event, the basic thrust of plaintiffs' complaint is admittedly directed at the validity of the two Parma ordinances passed by initiative vote in November, 1971. Whether this challenge is being made in the context of a justificiable controversy is the pertinent issue for consideration.

It is undisputed that the challenged ordinances are simply "on the books"; they have not as yet been applied

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to establish its right to build the project (Shafron Aff. ¶ 8, 9.)

At approximately the same time it made the decision, however, Forest City Enterprises requested the Federal Housing Administration, which had preliminarily approved the construction of the section 236 project in Parma, to grant it permission to build a virtually identical ten-story hi-rise development in Parma Heights on a site only a few hundred feet west of the original site in Parma. This request was granted, the requisite municipal approval was obtained, and the project was completed in October, 1973 (Shafron Aff. ¶ 10.)

Upon receiving approval from the F.H.A. to build in Parma Heights, Forest City Enterprises gave F.H.A. officials assurance that it would not build on the original site in Parma for a period of two years in order to allow the Federal Government to bring any suit it felt was appropriate, and absorb the economic loss that would result from holding the land in an undeveloped stage. (Shafron Aff. ¶ 11.)

Recently, however, Forest City Enterprises made the business judgment to honor its commitment until no later than February or March of this year and is presently developing plans and submitting proposals to the proper authorities in Parma to develop the site for commercial purposes. (Shafron Aff. ¶ 13.)

[5] See note 2 *supra*.

to any proposed federally subsidized housing project arguably within their ambit. Plaintiffs argue, however, that the passage and implementation of the ordinances directly and immediately injures them. The Court is unable to perceive how this is so.

The ordinance setting forth the thirty-five foot height limitation is on its face entirely neutral, applicable both to housing designed for rich and poor, and by its own force alone does not prevent plaintiffs from residing in Parma. Moreover, no allegation has been advanced that defendants, in reliance on this ordinance, have prohibited the construction of a low-income project with the intent and result of preventing plaintiffs, or any of the class they represent, from residing in the City. *See e.g., Sisters of Prov. of St. Mary of Woods* v. *City of Evanston, supra.* Nor has it been alleged that Parma has enacted the requirement to serve or operate as a barrier specifically designed to block an actual project from going forward. *See e.g., Park View Heights* v. *City of Black Jack, supra.* The most that can be drawn from plaintiffs' complaint is that Forest City Enterprises' building permit application was denied. But it is nonetheless clear that this ordinance was never applied to that now defunct project.

To be sure, the ordinance setting forth the referendum requirement does on its face purport to subject any development of low-income public housing or any participation by any housing development in the Federal Rent Supplement Program to public approval before such development or participation may go forward. By its own force, this ordinance places special burdens on the construction of housing in defendant City for which many of the named black plaintiffs at bar would be eligible. Yet here too the Court is being asked to render an essentially advisory opinion as to the validity of this ordinance absent circumstances where it is being applied or even threatened to be applied.

Plaintiffs argue that the mere existance of this ordinance operates to "chill" or deter builders from coming forward with proposals for housing suitable to their needs. In support of this contention, counsel have submitted a number of affidavits from private developers in the Cleveland Metropolitan Area which indicate that it is their policy to refrain from attempting to build subsidized housing in communities where their projects would be submitted to voter approval.[6]

Many of these affidavits, however, are predicated on the belief that Parma would apply this ordinance to private subsidized projects for moderate income residents such as, for example, those financed pursuant to Section 236 of the National Housing Act, 12 USC 1715z-1. The Court's reading of the ordinance is that it would not apply to section 236 developments except insofar as any such project seeks to participate in the Federal Rent Supplement Program, 12 USC § 1701s.[7] The uncertainty, however, as to what sorts of projects Parma would apply the ordinance serves only to underscore the hypothetical and contingent nature of the suit at bar.

With regard to the ordinance's effect on the construction of public housing within Parma, it is undisputed that the City has not as yet entered into any local cooperation

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[6] *See e.g., Aff.* of George Clarke Martin (Dec. 5, 1973); Aff. of Alan Gressel (Dec. 3, 1973); Aff. of A. F. Orlean (Nov. 30, 1973).

[7] This view is not based simply on a reading of Parma's Ordinance, but reflects also the Court's awareness that the referendum procedures of Article XXXIV of the California State Constitution, upon which Parma's Ordinance has been substantially patterned, have been construed by California's Attorney General not to be applicable to Sections 236, 235 and 221(d)(3) (National Housing Act §§ 1715z-1, 1715z and 1715[1]) type low rent housing projects acquired, developed or constructed by private persons or corporations and subsidized and insured by the Federal Government. See 54 Ops. Atty Gen. 168 (1971).

agreement with the Cuyahoga Metropolitan Housing Authority in accordance with 42 USC § 1415(7)(a) and (b).[8] As a consequence, no public housing may as yet be built in that community under the auspices of the CMHA. This refusal on the part of Parma and a number of other suburban communities to provide for public housing in the face of its clear need is currently under judicial scrutiny. *Mahaley* v. *CMHA*, 355 F.Supp. 1257 (N.D.Ohio 1973) (Appeal Pending). But at this stage in time, it is entirely conjectural as to what relationship the referendum requirement ordinance has relative to any decision by Parma or its officials to enter into such an agreement.[9] Therefore,

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[8] 42 USC § 1415(7)(a) and (b) provides: (For a general discussion of this statute, *see Mahaley* v. *CMHA*, *supra*, at pp. 1247-48.)

"In recognition that there should be local determination of the need for low-rent housing to meet needs not being adequately met by private enterprise—

(a) The Authority shall not make any contract with a public housing agency for preliminary loans (all of which shall be repaid out of any moneys which become available to such agency for the development of the projects involved) for surveys and planning in respect to any low-rent housing projects initiated after March 1, 1949, (i) unless the governing body of the locality involved has by resolution approved the application of the public housing agency for such preliminary loan; and (ii) unless the public housing agency has demonstrated to the satisfaction of the Authority that there is a need for such low-rent housing which is not being met by private enterprise; and

(b) The Authority shall not make any contract for loans (other than preliminary loans) or for annual contributions pursuant to this chapter with respect to any low-rent housing project initiated after March 1, 1949, (i) unless the governing body of the locality involved has entered into an agreement with the public housing agency providing for the local cooperation required by the Authority pursuant to this chapter. . . ."

[9] It would seem, however, that in passing the referendum requirement ordinance, the citizens of Parma were seeking to substitute their direct approval for the discretion of their public

it is again the case that even in the area of public housing, the ordinance's actual effect is at present uncertain.

Plaintiffs' reliance on a number of cases which permitted broad classes of low-income persons directly to challenge alleged governmental discriminatory practices in housing is misplaced. *See e.g., Mahaley* v. *CMHA, supra; Banks* v. *Perk,* 341 F.Supp. 1175 (N.D.Ohio 1972), *aff'd in part, reversed in part,* 473 F.2d 910 (6th Cir. 1973); *James* v. *Valtierra,* 313 F.Supp. 1 (N.D. Cal. 1970), *rev'd on other grounds,* 402 US 137 (1971); *Ranjel* v. *City of Lansing,* 293 F.Supp. 301 (W.D. Mich. 1969), *rev'd on other grounds,* 417 F.2d 321 (6th Cir.1969), *cert. denied,* 397 US 980 (1970); *Gautreaux* v. *C.H.A.,* 265 F.Supp. 582 (N.D.Ill. 1967). In all the above-cited cases, what was being challenged was governmental conduct which clearly and affirmately affected the rights of plaintiffs bringing suit, and actual controversies were so presented to the courts that effective relief could be fashioned, if such was necessary. The courts did not have to speculate concerning the direct and immediate interests of the plaintiffs, as this was patently evident.

The circumstances involved in *James* v. *Valtierra, supra,* are instructive. There plaintiffs, citizens of San Jose and San Mateo Counties, California, were "persons of low income who had been determined to be eligible for public housing and who had been placed on the appropriate waiting list." *See* 313 F.Supp. at 3. Principal defendants were the respective housing authorities of San Jose and San Mateo. Plaintiffs challenged the decision of these housing authorities not to request federal assistance with which to finance the construction of additional public housing units without prior approval by community vote as required by Article XXXIV of the California State Consti-

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officials in regard to any decision to enter into a cooperation agreement.

tution.[10] As relief, plaintiffs prayed the Court to declare Article XXXIV unconstitutional, and enjoin defendants from relying on it as a reason for not seeking federal financing. The dispute in *Valtierra* between plaintiffs and defendants, accordingly, was real and immediate. The putatively illegal policy of the housing authorities in deferring to the strictures of Article XXXIV had a direct and real effect on the immediate possibilities of the plaintiffs to have housing built which would be suitable to their needs, and the Court was in a position where it could fashion effective relief.

Mahaley v. *CMHA, supra,* is also worthy of close examination. There, actions were brought by classes of ten-

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[10] The full text of Article XXXIV is as follows:

"ARTICLE XXXIV PUBLIC HOUSING PROJECT LAW

§ 1. Approval of electors; definitions

Section 1. No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.

For the purposes of this article the term 'low rent housing project' shall mean any development composed of urban or rural dwellings, apartments or other living accommodations for persons of low income, financed in whole or in part by the Federal Government or a state public body or to which the Federal Government or state public body extends assistance by supplying all or part of the labor, by guaranteeing the payment of liens, or otherwise. For the purposes of this article only there shall be excluded from the term 'low rent housing project' any such project where there shall be in existence on the effective date hereof, a contract for financial assistance between any state public body and the Federal Government in respect to such project.

For the purposes of this article only 'persons of low income' shall mean persons or families who lack the amount of income which is necessary (as determined by the state public body developing, constructing, or acquiring the housing project) to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding."

ants and applicants for public housing in the Cleveland Metropolitan Area challenging *inter alia* the alleged unconstitutional acts of a number of suburban municipalities (including defendant City herein) in declining to enter into cooperation agreements with the Cuyahoga Metropolitan Housing Authority. Such agreements were necessary under the applicable law before any development of public housing in a particular locality could proceed.[11] The CMHA, a party to that suit, was shown to have taken sufficient affirmative steps to induce the defendant municipalities to allow public housing to be constructed within their boundaries. *Id.* at 1261-62. Under these circumstances, therefore, the conduct of the municipalities had a direct and immediate impact on plaintiffs bringing suit; and the Court was presented with a real and substantial controversy in which, again, effective relief could be fashioned.

In the instant suit, however, the Court is not presented with like circumstances. The challenged conduct of Parma in enacting the ordinances has not as yet directly and immediately injured plaintiffs. No actual conflict has yet arisen between the rights of the low and moderate income plaintiffs and the actions of the defendants relative to these ordinances. Indicative of the presence of abstract injury only is the fact that if the Court were to entertain this suit and on the merits declare the suspect ordinances invalid, this judicial action would not serve as the catalyst for the construction of the housing undeniably needed by plaintiffs. Public authorities and private sponsors would still be needed to come forward.

Accordingly, it must be held that challenge to the Parma ordinances is not being made in the context of a real and substantial controversy of sufficient immediacy or concreteness to warrant adjudication. *Golden* v. *Zwickler,* 394 US 103, 109 (1969). As the Supreme Court stated in *Thorpe* v. *Housing Authority,* 393 US 268, 284 (1969):

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[11] See note 8 *supra.*

"We do not sit . . . to 'decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision.' *Alabama State Federation of Labor* v. *McAdory*, 325 US 450, 461."

2. NAACP

The NAACP, in moving to further amend plaintiffs' complaint pursuant to Rule 15, F.R.Civ. P., seeks to cure the defects in pleading previously found by the Court in its order of September 18, 1973.[12] It seeks now to allege in substance that the conduct of defendants here being challenged has a direct and personal adverse effect on its low and moderate income members and on the Chapter itself in representing their interests.

For the reasons stated in the preceding section, even if leave to amend were granted, this plaintiff would not present the Court with a justiciable controversy. Therefore, this motion is denied.

3. White Plaintiffs

The two white plaintiffs in the *Cornelius* suit allege that they are at present residents of Parma who, due to the alleged discriminatory housing practices of their municipality, have been "denied the social, economic, and professional benefits of an integrated community and are embarrassed or otherwise suffer, being stigmatized in the white ghetto of Parma." It is averred that Parma's conduct constitutes injury to rights secured to them by the

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[12] There it was found that the NAACP had alleged only a broad general interest in the question presented by the suit. No allegations had been made that the NAACP, or any of its membership, was actively and concretely engaged in specific projects for the development of low income or other federally subsidized housing within the City of Parma. Nor were any allegations advanced that the NAACP or any of its members had been specifically aggrieved by the conduct of Parma.

Fair Housing Act of 1968, 42 USC § 3601 *et seq.*, and the Civil Rights Act of 1866, 42 USC § 1982. In support of their contention that they have standing to maintain this action, plaintiffs rely on the Supreme Court's recent decision in *Trafficante* v. *Metropolican Life Ins. Co.*, 409 US 205 (1972).

Trafficante involved an action brought by two tenants (one white and one black) of a large apartment complex in San Francisco. The tenants alleged that their apartment owners had engaged in numerous discriminatory housing practices, and that as a result of these practices they had been denied the various benefits of interracial associations, suffering much the same injuries as are alleged by the white plaintiffs herein. They sought relief both under 42 USC § 1982 and 42 USC § 3610 of the Fair Housing Act of 1968.

The Supreme Court considered only the tenants' rights under 42 USC § 3610. It held that the tenants fall within the scope of "persons aggrieved" contained therein and, accordingly, could maintain an action pursuant to that statute.

The Court noted that the definition of "persons aggrieved" in 42 USC § 3610(a) was broad,[13] *Id.* at 208. And that the injury alleged by the tenants was not insubstantial. *Id.* at 209. Further, it was observed that the important purposes of the Fair Housing Act would only be frustrated by rigid standing requirements. As "complaints by private persons are the primary method of obtaining compliance with the Act," such standing requirements should be construed as broadly as is permitted by Article III of the United States Constitution. *Id.* at 209. The im-

[13] Section 3610(a) provides in pertinent part: "Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter 'person aggrieved') may file a complaint with the Secretary."

portance of "private attorney general" suits in effectuating modern legislative programs was also underscored. It was observed that such suits would in particular "serve an important role in this part of the Civil Rights Act of 1968 in protecting not only those against whom a discrimination is directed but also those whose complaint is that the manners of managing a housing project affects 'the very quality of their daily lives.' " *Id.* at 211. The Court concluded:

> "We can give vitality to Section 810(a) [142 USC § 3610(a)] only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute." *Id.* at 212.

This Court, in its memorandum opinion and order of September 5, 1973, dealing with the Government's suit recognized that municipalities may be subject to suit under the Fair Housing Act. *See also Park View Heights Corp.* v. *City of Black Jack, supra,* 467 F.2d 1208 (8th Cir. 1972); *Kennedy Park Homes Assoc.* v. *City of Lackawanna, supra,* 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 US 1010 (1971); *United States* v. *City of Black Jack, supra,* .. ..F.Supp. .. ..P.H.E.O.H. Reptr. Para. 13,561 (E.D.Mo. 1972); *Sisters of Prov. of St. Mary of Woods* v. *City of Evanston, supra,* 335 F.Supp. 396 (N.D. 1971). Therefore, it would seem that in light of *Trafficante* a white tenant of a project owned by a municipality would have standing to challenge racial discrimination in the management of those facilities amounting to violations of the applicable provisions of the Fair Housing Act.

The issue presented by these plaintiffs, however, is broader. They submit that their legal right to interracial association, as recognized by *Trafficante,* extends so far as to enable them to challenge the alleged racial exclusionary activities of the city wherein they reside.

There are clear indications in *Trafficante* that the standing of persons to vindicate rights to interracial association is limited to circumstances where suit is brought against the management of their own housing facilities. The precise holding in that case was to accord standing "to *all in the same housing unit* who are injured by racial discrimination in the management of those facilities . . ." *Id.* at 211 (emphasis added.) Yet is must be observed that the housing complex under consideration in *Trafficante* was comprised of 8,200 residents and was, therefore, larger than many towns in this country. *Id.* at 206. Moreover, less than 1% of the tenants in the complex were black. *Id.* at 208 fn. 5. Accordingly, it would not be an unreasonable extension of *Trafficante,* and well within its spirit, to rule that white residents of a city like Parma, whose population barely exceeds 100,000, and whose black population is well below 1%, could challenge, under the Fair Housing Act, any purported racially exclusionary activity pursued by the City.

Assuming *arguendo* that *Trafficante* may be read to cover the activities of cities like Parma, the Court must still decide whether these plaintiffs set forth timely and justiciable causes of action either under the Fair Housing Act or 42 USC § 1982. It is concluded that they do not.

Plaintiffs' challenge to the two ordinances does not present the Court with a justiciable controversy under either statute. As was previously noted with regard to the black plaintiffs, these ordinances have not as yet been applied, or ever threatened to be applied. In consequence, they have not operated in any concrete sense to injure any rights arguably secured to the white plaintiffs.

Again, as with the black plaintiffs, it is unclear whether the *Cornelius* complaint squarely challenges Parma's denial of a building permit to the Forest City project. The white plaintiffs do not allege that they were even residents

of Parma at the time this project was blocked.[14] Clearly, however, if they were Parma residents at that time, it could well be contended that the blocking of this project, destined for integrated occupancy, injured their newly framed *Trafficante* rights to interracial associations.

Yet, plaintiffs' action under the Fair Housing Act is bottomed on 42 USC § 3612. This section provided in pertinent part:

> "The rights granted by Sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy. . . . A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred."

The Court notes that plaintiffs did not institute their action until April 27, 1973, and the denial of the building permit for the Forest City project occurred and ended in November, 1971. Plaintiffs' action under the Fair Housing Act, therefore, to the extent it seeks judicial review of this denial, is untimely. It was filed more than one hundred eighty days after this alleged discriminatory housing practice took place. *See James* v. *Hafter*, 320 F.Supp. 397 (N.D.Ga. 1970), *aff'd.*, 457 F.2d 511 (5th Cir. 1972); *Brown* v. *Dallas*, 331 F.Supp. 1033 (W.D.Tex. 1971). *Cf. Goodman* v. *City Products Corp.*, 425 F.2d 702 (6th Cir. 1970).

Nor do the white plaintiffs at bar have standing under section 1982 to challenge the denial of the building per-

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[14] Plaintiffs Robert Cain and Reverend Kenneth Coy are merely defined in the *Cornelius* amended complaint as: "white citizens of the United States and residents of Parma, Ohio." They seek to represent a class defined as follows: "All white citizens residing in Parma who are deprived of economic, social, and professional relations with minorities and who are being injured by being stigmatized in a white ghetto."

mit.[15] Their legal interests to interracial associations, while cognizable under the Fair Housing Act do not fall "arguably within the zone of interests to be protected" by section 1982. *Cf. Sierra Club* v. *Morton,* 405 US 727 (1972).

In *Jones* v. *Alfred H. Mayer Co.,* 392 US 409 (1968), section 1982 was substantially revitalized. There it was held that the statute barred all racial discrimination in the sale or rental of property and, thus construed, was a valid exercise of congressional power under the Thirteenth Amendment. As was observed, however, by the Ninth Circuit Court of Appeals in its treatment of *Trafficante* at 446 F.2d 1158, 1163:

> "[There is] nothing in *Jones* v. *Alfred H. Mayer* to indicate that Section 1982 would be construed to grant standing to sue to anyone other than a person who was the victim of racial discrimination in the sale or rental of property."

It was said, in addition:

> "The Court's examination of the legislative history of the Civil Rights Act of 1866 in *Jones* v. *Alfred H. Mayer, supra,* makes it clear that the purpose of Congress was to forbid racial discrimination affecting the basic civil rights enumerated therein, including the right to purchase or lease property, and to guarantee the newly freed slaves the property rights enjoyed by white citizens. . . . We find no indication that Congress intended to allow either third-party enforcement of the rights granted by Section 1982, or an independent right of action in a person who has not been stamped with a 'badge of slavery' either by an act of discrimination or some racially motivated interference with his property rights."

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[15] 42 USC § 1982 provides: "All citizens of the United States shall have the same rights, in every state or territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

While a number of cases decided subsequent to *Jones* have accorded standing to white plaintiffs under Section 1982, *See e.g., Sullivan* v. *Little Hunting Park, Inc.,* 396 US 229 (1969); *Williamson* v. *Hampton Mgmt. Co.,* 339 F.Supp. 1147 (N.D. Ill. 1972); *Walker* v. *Pointer,* 304 F. Supp. 56 (N.D.Tex. 1969), none may be read as supporting the proposition that white citizens who are not directly affected by black racial discrimination in the enjoyment of their property rights, may sue under that statute. In *Sullivan,* the white plaintiff had been expelled from a community recreation club because in the course of renting property, he had assigned club membership rights to a black person. In *Walker* the white plaintiffs had been evicted from their apartment because they had entertained black guests there. In *Williamson* the white plaintiff's right to sublet her apartment was interfered with on racial grounds. All of the white plaintiffs in these cases had themselves been "direct victims of black racial discrimination, discrimination directed at them because of their black associations." *Walker* v. *Pointer, supra,* at 58.

It is true that the Supreme Court's decision in *Trafficante* does not resolve the question of standing under section 1982 to vindicate rights to interracial associations. That issue was not reached. *Id.* at 209 fn.8. The concurring opinion of Mr. Justice White, however, joined by Justices Blackman and Powell, is revealing. There is was observed:

> "Absent the Civil Rights Act of 1968, I would have great difficulty in concluding that petitioner's complaint in this case presented a case or controversy within the jurisdiction of the district court under Article III of the Constitution."

Significantly, this Court's reading of section 1982 is buttressed by more recent comments of the Supreme Court clarifying the true nature of its holding in *Trafficante.* In both *Linda R. S.* v. *Richard D.,* 410 US 614, 617, n.3 (1973) and *O'Shea* v. *Littleton, supra,* .. .. US .. .. (1974), 42 U.S.L.W. 4139, 4141 n.2, the Court noted in dealing with

the justiciability problems there involved: "Congress may enact statutes creating legal rights, the invasion of which creates standing *even though no injury would exist without the statute. See e.g., Trafficante* v. *Metropolitan Life Ins. Co.*, 409 US 205, 212 (1972) (White, J. concurring); *Hardin* v. *Kentucky Utilities Co.*, 390 US 1, 6 (1968)." (Emphasis added.) This statement is contained in the majority opinion of both the above-cited cases. It may only be read as an indication that whatever right there is to redress injury to interracial association arises solely from the Fair Housing Act; and that the rights secured by section 1982, accordingly, are not co-extensive, in this regard, with those conferred by the 1968 Act.

The purposes of the Fair Housing Act and section 1982 are, to be sure, substantially parallel. Both were generally designed to prohibit discrimination in housing. But section 1982 does differ markedly from the 1968 Act both in purpose and scope. There are "vast differences between, on the one hand, a general statute applicable only to racial discrimination in the rental and sale of property and enforceable only by private parties acting on their own initiative and, on the other hand, a detailed housing law, applicable to a broad range of discriminatory practices and enforceable by a complete arsenal of federal authority." *Jones* v. *Alfred H. Mayer Co., supra,* at 417. The Fair Housing Act is a comprehensive legislative effort designed to remedy a pressing social need. As recognized in *Trafficante,* Congress intended, by its broad definition of "persons aggrieved" in the Fair Housing Act, to enable all persons to redress injury to the right to interracial association. Regretfully, this newly created right may not be read into section 1982, the Fair Housing Act's Nineteenth Century counterpart.

Accordingly, the Court reaffirms its holding, made in the memorandum opinion and order of September 18, 1973,

that the white plaintiffs lack standing under 42 USC § 1982 to litigate their rights to interracial associations.[16]

IV. GOVERNMENT SUIT

The Attorney General has instituted suit under the Fair Housing Act of 1968, 42 USC §§ 3601 *et seq.*, seeking to challenge Parma's alleged wholesale deprivation of rights under the Act.[17] One of the City's acts which the Government suit seeks to review is the denial of the building permit to Forest City Enterprises.

Defendant Parma, in arguing that the United States lacks standing to challenge this permit denial states:

> "It would be a scandal of major proportions for the Attorney General, in the name of the United States of America, to expend taxpayers' money in an attempt to vindicate any alleged claims on behalf of a highly successful builder and promoter."

This argument is more shrill than persuasive and merits but little discussion.

The Attorney General's suit is jurisdictionally based on 42 USC § 3613. This section provides:

> "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court. . . ."

Actions brought pursuant to this section should not seek simply to redress the private interests of any particular citizen or business entity, although this of course may be

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[16] All private plaintiffs may appear as *amicus curiae* in the Government suit.

[17] In addition, the United States bases its cause of action on the Thirteenth and Fourteenth Amendments.

partially what is at stake. Nor should suit be brought to challenge isolated, accidental, or peculiar discriminatory acts or conduct. *See United States* v. *Pelzer Realty Co.*, 484 F.2d 438 (5th Cir. 1973); *United States* v. *Peachtree Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971). Rather, the larger purpose is to enable the Attorney General, in his official capacity as chief law enforcement officer of the United States, to protect the interest of the United States in seeing that its laws are enforced. *United States* v. *Northside Realty Associates*, 324 F.Supp. 287, 292 (N.D.Ga. 1971), *remanded on other grounds*, 474 F.2d 1164 (5th Cir. 1973); *United States* v. *Leubke*, 345 F. Supp. 179, 181 (D.C. Colo. 1972).

Parma's denial of the building permit affects the rights and interests of many others besides the particular developer or promoter. It manifestly had a pronounced effect on those who would have been residents of the project if it had been allowed to go forward. Since it can be said that this act constitutes a denial of rights under the Fair Housing Act to a group of persons, the matter is properly raised for adjudication under 42 USC § 1613.[18]

The Government also seeks to directly challenge the passage and implementation of the two Parma ordinances as part of its pattern or practice action. But, as was discussed previously, these ordinances may not be said to have operated in any real sense to deny or make unavailable dwellings on the basis of race. See 42 USC § 3604(a). Nor have they as yet interfered with sponsors of federally assisted housing who seek to aid persons in exercising their right to equal housing opportunities. See 42 USC § 3617.

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[18] The initial determination of whether a denial of rights raises a question of public importance is left to the discretion of the attorney General. *United States* v. *Northside Realty Assoc., Inc.*, 474 F.2d 1164, 1168 (5th Cir. 1973); *United States* v. *Bob Lawrence Realty, Inc.*, 474 F.2d 115 (5th Cir. 1973), *cert. denied*, —— US —— (1973).

Accordingly, the Attorney General does not have standing to raise the validity of these ordinances within the ambit of his pattern or practice suit.[19] However, should the remaining allegations be proven and if affirmative relief is granted, it may be necessary in fashioning appropriate relief for the Court to deal with these ordinances. *See e.g., Gautreaux* v. *City of Chicago,* 480 F.2d 210 (7th Cir. 1973).

CONCLUSION AND ORDER

Accordingly, IT IS HEREBY ORDERED:

(1) That plaintiffs' amended complaint in the *Cornelius* suit be dismissed;

(2) That the plaintiff NAACP's motion to amend the *Cornelius* complaint is denied; and

(3) That the Government's complaint, insofar as it seeks to directly challenge the two Ordinances, is dismissed.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI,
Frank J. Battisti,
Chief Judge

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[19] As noted previously, the United States complains that the ordinances violate the Thirteenth and Fourteenth Amendments. Case authority recognizes that the United States has an implied civil cause of action to seek the removal of impediments to interstate commerce. It is reasoned that such an action is inherently within the national power to regulate commerce. *See e.g., In re Debs,* 158 US 564 (1895); *United States* v. *City of Jackson, Mississippi,* 318 F.2d 1 (5th Cir. 1963); *United States* v. *Brand Jewelers, Inc.,* 318 F.Supp. 1293 (S.D. N.Y. 1970). Judge Frankel in *Brand Jewelers,* in addition to recognizing an action under the commerce clause, held in the alternative that the Fourteenth Amendment also provided an implicit cause of action to the United States to seek redress for "widespread" due process deprivations. Here, however, the existence of the ordinances do not afford standing to the Attorney General with respect to any implied cause of action arguably present under either amendment. As yet, there has been no deprivation of private rights.

No. 74-1401

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

JACQUELINE CORNELIUS, *et al., Plaintiffs-Appellants,*

vs.

CITY OF PARMA, OHIO, *et al., Defendants- Appellees.*

(FILED OCTOBER 22, 1974)

Before: EDWARDS, PECK and MCCREE, *Circuit Judges.*

On consideration of the briefs and records and oral arguments in the above-styled appeal; and

Noting that the complaint appears to state a cause of action alleging racial discrimination in the exclusion of black citizens from equal access to housing, jobs and educational opportunities in the City of Parma, Ohio, which requires a factual hearing,

The judgment of the District Court is vacated and the case is remanded for trial.

Entered by order of the Court
/s/ JOHN P. HEHMAN
Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 30, 1975

Robert R. Soltis, Esq.
Special Counsel—City of Parma
Parma City Hall
6611 Ridge Rd.
Parma, Ohio 44129

Re: CITY OF PARMA, OHIO, ET AL. v. JACQUELINE CORNELIUS, ET AL., 74-970

Dear Sir:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Warth* v. *Seldin*, 422 U.S. —— (1975).

Mr. Justice Douglas took no part in the consideration or decision of this petition.

Encl.—cc opin. in
73-2024, *Warth* v. *Seldin*

Very truly yours,
MICHAEL RODAK, JR., *Clerk*
By
/s/ Helen Taylor
HELEN TAYLOR (MRS.)
Assistant Clerk

James P. Mulkeen, Esq.
Nat'l Comm. against Discrimination in Housing, Inc.
Suite 418—1425 H St., N.W.
Washington, D.C. 20005

No. 74-1401

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

JACQUELINE CORNELIUS, *et al., Plaintiffs-Appellants,*

vs.

CITY OF PARMA, OHIO, *et al., Defendants- Appellees.*

(FILED SEPTEMBER 24, 1975)

Before: EDWARDS, PECK and MCCREE, *Circuit Judges.*

On receipt and consideration of an order of the United States Supreme Court, dated June 30, 1975, vacating this court's previous judgment in the above-styled case and remanding "for further consideration in the light of *Warth* v. *Seldin,* 422 U.S. —— (1975)"; and

After careful study of the majority and dissenting opinions in *Warth, supra;* and

Believing it to be completely dispositive of the instant litigation;

Said appeal is now remanded to the District Court with instructions to dismiss the complaint.

Entered by order of the Court
/s/ JOHN P. HEHMAN
Clerk

No. 74-1401

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

JACQUELINE CORNELIUS, *et al., Plaintiffs-Appellants,*

vs.

CITY OF PARMA, OHIO, *et al., Defendants- Appellees.*

(FILED OCTOBER 31, 1975)

Before: EDWARDS, PECK and MCCREE, *Circuit Judges.*

On receipt and consideration of a petition for rehearing in the above-styled case,

The same is hereby denied.

Entered by order of the Court
/s/ JOHN P. HEHMAN
Clerk

The relevant provisions of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601, *et seq.*, are as follows:

Section 3604

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

Section 3612(a)

The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount of controversy and in appropriate State or local courts of general jurisdiction.

Section 3612(c)

The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

Section 3617

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment or, on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 803, 804, 805, or 806. This section may be enforced by appropriate civil action.

Supreme Court, U. S.
FILED
NOV 11 1976

Supreme Court of the United States

October Term, 1976
No. 76-1012

JACQUELINE CORNELIUS, *et al.*,
Petitioners,
vs.
CITY OF PARMA, OHIO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF OF RESPONDENTS

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Supreme Court of the United States

October Term, 1975
No. 75-1012

JACQUELINE CORNELIUS, *et al.*,
Petitioners,

vs.

CITY OF PARMA, OHIO, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article III

JUDICIAL DEPARTMENT

* * * * *

SECTION II

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies

to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects. * * *

42 U.S.C. §3612

(a) The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred. * * *

QUESTION PRESENTED

Whether, upon remand from this Court for further consideration in light of *Warth v. Seldin*, 422 U.S. 490 (1975), the Court of Appeals correctly applied its teachings in ordering that the complaint be dismissed, where the petitioners failed to allege specific injury to themselves and otherwise failed to demonstrate that they had standing to sue, or that there was a justiciable case or controversy under Article III of the Constitution.

STATEMENT OF THE CASE

This is the second time that this litigation is before the Court. On June 30, 1975, the Court granted respondents' petition for a writ of certiorari in Case No. 74-970, styled *City of Parma, Ohio, et al. v. Jacqueline Cornelius,*

et al. That petition sought relief against the Court of Appeals' judgment which had vacated the District Court's judgment dismissing petitioners' amended complaint for lack of a justiciable case or controversy under Article III of the Constitution.

This Court's Order in Case No. 74-970 reported at 422 U.S. 1052 (1975) read: "The petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Warth v. Seldin,* 422 U.S. [490] (1975)."

Upon remand, the Court of Appeals obeyed the Order and compared the allegations of petitioners' amended complaint[1] with the discussion of plaintiffs' complaint in *Warth, supra.* The pleadings closely paralleled each other, and so the Court of Appeals correctly ruled that:

> After careful study of the majority and dissenting opinions in *Warth, supra,* and
>
> Believing it to be completely dispositive of the instant litigation;
>
> Said Appeal is now remanded to the District Court with instructions to dismiss the complaint.

Factual Background

On November 2, 1971, general election day, the people of Parma, Ohio, passed two ordinances which had been placed on the ballot by initiative petitions circulated in July, 1971, in accordance with the Constitution and

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1. Inasmuch as petitioners did not print the text of their amended complaint in the appendix to their petition for a writ of certiorari, respondents respectfully refer the Court to pages A-36 to A-44 of their separately-printed appendix to their petition in the prior case, No. 74-970, for the exact wording thereof. References thereto will be hereinafter designated "Resp. A- ".

statutes of Ohio. One of the ordinances restored the former 35-foot height limitation on all residential buildings. The other ordinance, as the District Court specifically found (Petitioners' Appendix 13a, note 7),[2] was patterned on Article XXXIV of the California Constitution, which had been found constitutional and commendable in *James v. Valtierra*, 402 U.S. 137, 141 (1971).

It gives the right to the people of Parma, by way of referendum, to decide whether or not to accept federal aid for low-rent housing and rent supplements, pursuant to the consent requirements of federal law.

On November 3, 1971, Parma's building commissioner, acting upon the city engineer's memorandum of October 28, 1971, returned the plans and building permit application to Forest City Enterprises, since they still did not conform to Parma's codified ordinances after numerous notices to that effect had been sent to Forest City Enterprises and it had failed to seek a variance or submit plans which did comply.

The proposed Forest City project, Parmatown Woods, was to be a 10-story high-rise apartment building for the elderly, subsidized under Section 236 of the National Housing Act, 12 U.S.C. §1715 z-1. As part of the application process, Forest City filed with the Federal Housing Administration (F.H.A.) an "Affirmative Marketing Plan" (Resp. A-45 to A-47) wherein it advised the government that the expected tenants would be elderly persons from the ethnic groups who predominate in the area.

Parma's population is in large part made up of descendants of immigrants who, being victims of Nativist prejudice and discriminatory laws such as the "National

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2. References to petitioners' appendix will be hereinafter designated "Pet. App. ".

Origins Quotas" Immigration Acts, clustered in residential neighborhoods of like cultural and religious identity. This ethnic grouping occurred naturally by free choice without any involvement of city officials. Few nonwhite persons chose to live in the Parma area, and so Forest City advised the F.H.A. that it was not expected they would be attracted to the project.

Forest City built the virtually identical subsidized-project, known as Independence Place, a few hundred feet west in the adjacent community of Parma Heights, in conformity with its ordinances, and asked Parma to rezone the abandoned project-site for commercial development.

As foreseen by Forest City in the identical "Affirmative Marketing Plan" filed with the F.H.A., no nonwhites have moved into Independence Place, even though they were actively solicited to become tenants (Resp. A-48 to A-49). None of the plaintiffs filed an application, or even inquired about becoming tenants (*Id.* A-50).

Although the denial of a building permit to Forest City because of its failure to comply with pre-existing ordinances and the passage of the two initiated ordinances were coincidental in point of time, they were causally unrelated, for the initiated ordinances did not take effect until November 22, 1971, five days after the county board of elections certified their passage.[3] Had Forest City resubmitted the application for the permit or requested a variance before said date, the initiated ordinances would not have been in effect and therefore not applicable.[4] Forest City did neither, nor did it appeal the permit denial, nor is it a party to this litigation. As the District Court

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3. Ohio Revised Code §731.31.

4. The referendum ordinance would not apply to any Section 236 development except insofar as Federal Rent Supplements are involved (Pet. App. 13a).

expressly found, the initiated ordinances are merely "on the books" and have never been applied to any project (Pet. App. 11a).

Proceedings Below

This action was filed by petitioners on April 17, 1973, more than sixteen months after the November incidents described above. It was instigated, filed, and is being maintained by counsel employed by the National Committee Against Discrimination in Housing (NCDH), a Washington-based organization which has maintained and participated in numerous housing suits throughout the country, with assistance from local counsel.

A few minutes after this suit was filed, a similar action was filed in the name of the United States by the Attorney General. It is pending in the District Court and, as this Brief is being written, is awaiting a ruling on Parma's motion for a summary judgment.

Petitioners did not allege that they were eligible for, or could afford to live in, the elderly housing project which was not built in Parma when Forest City failed to comply with Parma's pre-existing ordinances. Neither did they allege that they had ever lived in Parma or sought to live there. In paragraph 22 of their amended complaint (Resp. A-41), petitioners referred to a decision of the District Court which had ruled in another case that the failure of Parma (and four other cities) to sign cooperation agreements for the construction of public housing was prima facie evidence of an intent to exclude blacks. However, the Court of Appeals for the Sixth Circuit reversed that decision and expressly held that the findings of alleged discrimination by the District Court "are not supported by substantial evidence and are clearly erroneous". *Mahaley v. Cuyahoga Metropolitan Housing Authority,* 500

F.2d 1087, 1091, footnote 3 (6th Cir. 1974), *cert. denied* 419 U.S. 1108 (1975).

In the course of its comprehensive opinion (Pet. App. 1a to 28a), upon which its judgment of dismissal for lack of a justiciable case or controversy was based, the District Court reaffirmed its prior order holding that the action under 42 U.S.C. §3612 was time-barred (*Id.*, 22a). Only the black plaintiffs, petitioners herein, presented issues for review upon appeal to the Court of Appeals for the Sixth Circuit, but no issue as to the dismissal of their 42 U.S.C. §3612 (Fair Housing Act) claim for being time-barred was presented or briefed by them.

REASONS FOR DENYING THE WRIT

Warth Case Is Controlling

Petitioners raise no issues of substance and demonstrate no special and important reasons warranting review. The Court of Appeals for the Sixth Circuit obeyed the order of remand of this Court and further considered this action in light of *Warth v. Seldin*, 422 U.S. 490 (1975). It correctly found that *Warth* is completely dispositive of this litigation.

Petitioners have failed to present with accuracy, brevity, and clearness whatever point it is they are attempting to make. Under Rule 23(4) of the Rules of this Court, that alone is sufficient reason for denying their petition.

This action closely tracks *Warth*. As did the plaintiffs in *Warth* (422 U.S., at 502), petitioners asserted standing as persons of low or moderate income and as members of a minority racial group. Similarly, petitioners alleged that the enforcement of Parma's ordinances by respondent

officials would have the effect of excluding persons of low and moderate income, many of whom are members of racial or ethnic minority groups. However, the Parma ordinances in this litigation have, in fact, never been applied to any concrete project and are merely "on the books" (Pet. App. 11a). In short, "the facts alleged fail to support an actionable causal relationship between [Parma's ordinances] and petitioners' asserted injury." *Warth*, at 507.

No excuse is readily apparent for the outright falsehood stated by the NCDH in petitioners' petition on page 16. In their desperate but unsuccessful attempt to distinguish this litigation from *Warth*, they stated that "the plaintiffs in this case allege explicitly that they and members of the class they represent were eligible to reside in the subsidized housing which was blocked by the defendants." There is no such allegation in petitioners' pleading (Resp. A-36 to A-44). The District Court correctly found that no live controversy presently exists regarding this housing. It expressly held that "Indeed, plaintiffs accept this reality, for as shown by their complaint none of them have alleged that they were themselves prospective tenants of the Forest City development. Nor do they seek to represent a class so limited" (Pet. App. 11a). As the uncontroverted affidavits of respondents filed in the District Court attest (Resp. A-45 to A-50), no blacks became tenants in the identical elderly housing project actually built a few hundred feet west of the Parma site, nor did any of the petitioners even make inquiries about becoming tenants.

In the action at bar, the District Court expressly found that the "challenged conduct of Parma in enacting the ordinances has not as yet directly and immediately injured plaintiffs. No actual conflict has yet arisen between the rights of the low and moderate income plain-

tiffs and the actions of the defendants relative to these ordinances. Indicative of the presence of abstract injury only is the fact that if the Court were to entertain this suit and on the merits declare the suspect ordinances invalid, this judicial action would not serve as the catalyst for the construction of the housing undeniably needed by plaintiffs. Public authorities and private sponsors would still be needed to come forward." (Pet. App. 17a).

Warth, at 508, confirmed the correctness of the District Court's reasoning: ". . . a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the court's intervention. Absent the allegations of a demonstrable, particularized injury, there can be no confidence of 'a real need to exercise the power of judicial review' or that relief can be framed 'no broader than required by the precise facts to which the court's ruling would be applied'. *Schlesinger v. Reservists to Stop the War*, 418 U.S., at 221-222."

Moreover, "if none of the named plaintiffs . . . establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class" which they purport to represent. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

Trafficante Case Is Inapposite

Petitioners' extended discussion of *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), is entirely irrelevant to any issue in this action. Petitioners' amended complaint on its face reveals, as the District Court cogently held (Pet. App. 22a), that any claim under Title VIII of the Fair Housing Act, 42 U.S.C. §3601 *et seq.* was time-barred for not having been filed within

the 180-day limitation imposed by 42 U.S.C. §3612. *Trafficante* dealt only with the standing of white tenants of an apartment complex to bring suit under §810 of the Act, 42 U.S.C. §3610. Petitioners stated, on page 2 of the petition for a writ of certiorari, that the sole question presented for review here is the standing of lower income minority persons. Thus, *Trafficante* is inapposite. The white plaintiffs in this action were properly dropped by the District Court. They failed to present to the Court of Appeals any issue for review of, or to brief, their being dropped. They are not parties here.

Petitioners misstated the holding in *Trafficante*. It did not state that Title VIII in its entirety must be given a "generous construction". That case dealt only with the wording of §810, 42 U.S.C. §3610, which is not the section under which plaintiffs purported to bring this action. *Trafficante* does not stand for the proposition that an action may be filed sixteen months after the alleged discriminatory housing practice occurred. On page 33a of their Appendix, petitioners purportedly printed the text of 42 U.S.C. §3612 (a), but they omitted the very next sentence which reads "A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred." No Title VIII claim is involved here, for "The statute thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself." *United States, ex rel. Texas Portland Cement Company v. D.C. McCord*, 233 U.S. 157, 162 (1914).

"Attorneys whose names are affixed to briefs filed in this Court have a heavy responsibility to see to it that . . . statements therein are completely accurate." *Qual-*

ity Molding Company v. American National Fire Insurance Company, 287 F.2d 313, 316 (7th Cir. 1961), *cert. denied* 368 U.S. 826 (1961).

Not only is the concept inapplicable to this litigation, but there was no need for the NCDH to seek out "private attorneys general" and file suit on their behalf, for the Attorney General himself filed an action in the name of the United States against Parma at the same time the NCDH did.

CONCLUSION

In compliance with the Order of the Court remanding this action for further consideration in light of *Warth v. Seldin, supra,* the Court of Appeals correctly decided that it was completely dispositive of the litigation and ordered the complaint dismissed. This decision is consistent with the holding of another panel of that Court, which recognized that judges "have no discretion but . . . to follow all applicable decisions of the Supreme Court." *Mahaley, supra,* 500 F.2d at 1094, footnote 5. Petitioners raise no novel or substantial issues, and have not presented with accuracy any special and important reasons for granting review. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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